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In The

Supreme Court of the United States

October Term, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,

Debtor.

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Amicus curiae will address the following question:

In a civil action by an insolvent common carrier to enforce and collect its unambiguous filed tariff rate (the "filed rate") from a private shipper, must the trial court delay enforcement of that rate merely because the shipper alleges that the rate is unreasonable, even though:

1. the shipper may protect its right to recover reparations for payment of an unreasonable filed rate by depositing it with the court under Rule 67 of the Federal Rules of Civil Procedure as amended in 1983;

2. enforcement of the filed rate is "utterly central" to the Interstate Commerce Act (*Maislin*, 111 L.Ed.2d at 112);

3. a filed rate is binding unless and until suspended by the ICC;

4. the plain meaning of the Interstate Commerce Act conflicts with a shipper's purported implied right to withhold payment, and the legislative history of the reparations provisions does not show a clear intent to overrule *Crancer v. Lowden*, 315 U.S. 631 (1942);

5. Congress in 31 U.S.C. § 3726 only granted the United States, not private shippers, a right to withhold payment; and

6. permitting the shipper to withhold payment of the filed rate will prejudice both solvent and insolvent carriers?

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INTEREST OF AMICUS CURIAE

Amicus curiae is Leonard L. Gumport, the chapter 7 bankruptcy trustee of the estate of Transcon Lines. Transcon Lines was a major motor common carrier with annual revenues in excess of $200 million.

Transcon Lines collapsed during the period of illegal rate destabilization promoted by the ICC under its *Negotiated Rates* policy. In May 1990, health, welfare and pension plans of Transcon Lines filed an involuntary bankruptcy petition against it. In June 1990, less than 30 days before this Court invalidated the ICC's *Negotiated Rates* policy in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ___ (1990), the Bankruptcy Court for the Central District of California appointed Mr. Gumport as trustee of Transcon Lines.

During the *Negotiated Rates* regime, Transcon Lines operated at a deficit while granting secret discounts to attract and hold the trade of shippers. Among other things, Transcon Lines funded the deficits caused by its rate discounts by: (1) wage concessions from its employees, (2) defaults on payments to their health, welfare and pension plans, and (3) neglect of its legal duty to conduct environmental clean up of the underground fuel storage tanks at its truck terminals throughout the country.

Once a source of jobs for more than 3,000 employees throughout the United States, Transcon Lines now has only two employees. It has no business operations. It has thousands of creditors, including former employees, their benefit funds, equipment lessors, and landlords. Its primary activities consist of efforts to recover illegal discounts and to remediate and sell its polluted truck terminals.

Although Transcon Lines went bankrupt while granting secret discounts to shippers, the recipients of these illegal discounts now contend that any payment by them

should be delayed while they litigate the reasonableness of Transcon Lines' filed tariff rates. The shippers' evidence that Transcon Lines' filed rates are unreasonable include Transcon Lines' illegal, unfiled rates (which helped to bankrupt Transcon Lines), and the secret discount rates of other carriers (who may have offered non-compensatory rates to solicit or hold business while the ICC abdicated its duty to enforce the tariff system).

Beginning in 1990, the ICC sought to halt the filed rate collection effort of the Transcon Lines trustee. *See ICC v. Transcon Lines*, ___ F.2d ___ (9th Cir., June 17, 1992)(petitions for rehearing pending). On March 10, 1992, the Chairman of the ICC publicly condemned the filed rate doctrine as a "dinosaur." *See* Appendix A. The ICC has indicated that it may revive its illegal *Negotiated Rates* policy through the subterfuge of making unfiled rates evidence that filed tariff rates are unreasonable and therefore unenforceable. *See Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991).

Perceiving that the ICC will adhere to its view that unfiled rates should be enforced, shippers now seek wholesale referral of filed rate litigation to the ICC for rate reasonableness hearings. In the meantime, the former employees of Transcon Lines remain unpaid, the polluted truck terminals remain unremediated, the ICC publicly scorns as a "dinosaur" the statutory tariff system mandated by Congress, and money that shippers should

disgorge or pay into court under Fed.R.Civ.P. 67 is consumed instead in legal fees.[1]

SUMMARY OF ARGUMENT

Petitioners should pay the filed rate, and the ICC should enforce the tariff system as urged by Respondents. Petitioners and their amici create a false dilemma by failing to mention the provisional remedy provided by Fed.R.Civ.P. 67. As amended in 1983, Rule 67 permits Petitioners to preserve their right to reparations by paying the filed tariff rate into the registry of the trial court.

To allow Petitioners to delay payment of the filed rate during protracted ICC hearings on rate reasonableness would undermine the "utterly central" policy of enforcement of the filed rate. Withholding payment of the filed rate prejudices both solvent and insolvent carriers. The plain meaning of the Interstate Commerce Act is inconsistent with an implied right to withhold payment of the filed rate. An unsubstantiated claim of rate unreasonableness never justifies agency referral. Illegal, unfiled rates are not competent evidence of the unreasonableness of filed rates.

This case does *not* involve the admittedly "unique" right of set-off that Congress did give to the United States in 31 U.S.C. § 3726. *See* brief of amicus ICC at 13 n.7.

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent will be filed with the Clerk of this Court.

ARGUMENT

I. FED.R.CIV.P 67 PROVIDES A REMEDY FOR PETITIONERS' FALSE DILEMMA, SO THAT THERE IS NO REASON TO OVERRULE *CRANCER v. LOWDEN* OR TO UNDERMINE THE "UTTERLY CENTRAL" PURPOSE AND PLAIN MEANING OF THE INTERSTATE COMMERCE ACT

A. Petitioners' False Dilemma

Petitioners have no valid excuse to withhold payment of the filed rate. They can and must pay it – either to the carrier or the court registry

In their statement of issue and throughout their briefs, Petitioners and their amici emphasize that this case involves an insolvent carrier. Petitioners argue that their right to recover reparations is meaningless unless Petitioners have an implied statutory right to withhold payment of the filed rate pending final ICC adjudication of rate reasonableness claims.

Respondents refute those arguments. Further, as described below, Petitioners' purported dilemma does not in fact exist. Private shippers sued by an insolvent carrier can preserve the right to recover reparations by paying the filed rate into the registry of the court. This remedy is consistent with the statutory language and the policy of strict enforcement of the filed rate doctrine. The remedy proposed by Petitioners – judicial creation of a right to withhold payment until the ICC conducts protracted rate review proceedings – is not.

B. Fed.R.Civ.P. 67 Makes *Crancer v. Lowden* Equally Applicable To Filed Rate Claims Of Insolvent Carriers

More than five decades ago, this Court held that a trial court has discretion to enforce a carrier's filed rate claim against a shipper without waiting for the ICC to decide the shipper's rate reasonableness claims against the carrier. *Crancer v. Lowden*, 315 U.S. 631 (1942). In holding that the trial court correctly proceeded to enforce the carrier's filed rate claim, the Court noted that it was "important to aid the efforts of a carrier in collecting published charges in full." *Id.* at 635.

Petitioners and their amici do not ask this Court to overrule *Crancer*. Instead, they attempt to distinguish it on the ground that it involved a solvent carrier who could make the shipper whole if the ICC awarded a reparations claim. In fact, the Court in *Crancer* did not state that the carrier was solvent, and stated only that a reparations claim was a "complete remedy. . . . " *Id.*, 315 U.S. at 635.

After *Crancer* was decided, Fed.R.Civ.P. 67 was amended to provide a provisional remedy to a defendant that owes money to a plaintiff but claims an interest in that money. Under Rule 67, when an insolvent carrier sues to recover a filed rate from a shipper, the shipper can fully preserve its ability to recover reparations by paying the filed rate into the registry of the court. Rule 67 provides:

> In any action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing.

The 1983 amendment to Rule 67 broadened it to permit a party who claims an interest in the deposited funds to make the deposit. *See Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1474-75 (5th Cir. 1987), *modified* 831 F.2d 557 (1987)(in dispute between public utilities, the district court properly utilized Rule 67 to permit one utility to deposit disputed payments into court registry).

Petitioners should have utilized Rule 67 if they wanted to preserve their right to recover reparations. Petitioners do not even mention Rule 67, because Petitioners do not want reparations. They want to withhold payment. If the Court condones this, failed carriers will suffer the kind of protracted bankruptcy proceedings that are a national disgrace. Other marginally solvent carriers will fail when their filed rate claims are met with spurious rate reasonableness defenses. Petitioners must obey the law and pay the filed rate.[2]

C. The Primary Jurisdiction Doctrine Does Not Permit Referral To The ICC Of A Filed Rate Claim When The Meaning Of The Tariff Is Not In Dispute

When an issue is not within the primary jurisdiction of an agency, then a trial court has no power to refer that

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[2] The defects in the proposed remedies of set-off and recoupment are discussed in Sections I.E.2 and I.E.3 of this brief.

issue to the agency. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1950). In *Montana-Dakota*, the Court stated:

> If the court is presented with a case it can decide[,] but *some issue* is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer *that issue*. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. 341 U.S. at 254 (emphasis added).

This principle compels the conclusion that enforcement of an unambiguous filed rate should not be referred to the ICC under the primary jurisdiction doctrine. Unless a tariff is ambiguous, a court should not refer the issue of tariff interpretation to the ICC. *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 69 (1956), *citing Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) and *Crancer v. Lowden*, 315 U.S. 631 (1942). Further, after determining the applicable filed rate, the trial court has discretion to proceed to enforce the carrier's filed rate claim, regardless of the pendency of administrative reparations proceedings. *Crancer*, 315 U.S. at 635.

D. The Filed Rate Doctrine Is "Utterly Central" To The Interstate Commerce Act And Would Be Undermined By A Rule That Permits A Shipper To Withhold Payment Of The Filed Rate Pending A Hearing On Rate Reasonableness

The filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act. *Maislin*

Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. ___, 111 L.Ed.2d at 112, *quoting Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)(Scalia, J.). This policy precludes imposing a judicial gloss on the Act that would undermine this statutory purpose, especially when a more plausible interpretation would further this purpose. *See Maislin*, 111 L.Ed.2d at 110-11 (ICC could not utilize its agency expertise to justify adopting a rule that would undermine the statutory filed rate doctrine).

Petitioners and their amici overlook *Maislin's* ruling that compliance with the statutory filed rate doctrine in 49 U.S.C. §§ 10761 and 10762 is "utterly central" to the administration of the Act. *Maislin*, 111 L.Ed.2d at 112. Instead, they incorrectly assert that rate reasonableness – not the filed rate doctrine – is the "bedrock," the "core," the "cornerstone," and the "central requirement" of the Act. *See* brief of amicus National Industrial Transportation League et al., ("NITL") at 3, 9, 10 and 11. NITL cites no authority for these assertions, which contradict *Maislin*.

Petitioners and their amici similarly overlook inconvenient language from *Maislin* when they quote out of context *Maislin's* assertion that "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 111 L.Ed.2d at 109; *see* brief of amicus NITL at 13. In the very same paragraph of text, the Court in *Maislin* explained: *"Unless and until suspended or set aside,* [the filed rate] is made, for all purpose, the legal rate. . . . " *Maislin*, 111 L.Ed.2d at 109, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)(emphasis in original). This overlooked language contradicts the position of Petitioners and their amici that a shipper has a

right to withhold payment of the filed rate *before* the ICC suspends or sets aside the rate. On the contrary, this language compels the conclusion that a shipper must pay the filed rate, and is excused from that legal duty only in the event that the ICC actually does suspend or set aside the filed rate.

Petitioners and their amici want the filed rate doctrine transformed into a "filed opening bid" doctrine. Under the "filed opening bid" doctrine, the filed tariff rate would merely signify what the carrier proposed to receive as payment; the shipper would remain free at all times to object to the filed opening bid as unreasonable. Under this system, neither the shipping public nor the ICC would know from the carrier's filed tariffs what rates were actually in effect. Discrimination would be facilitated and unfiled, secret rates would proliferate.[3]

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[3] In recommending enactment of the filed rate doctrine in the landmark Interstate Commerce Act, the Senate Select Committee on Interstate Commerce emphasized that rigid adherence to the published rate was necessary:

> The posting or publication of railroad rates would be of no advantage to the public unless the law contemplates and requires that the schedules established and posted are strictly adhered to. If variations from the published rates are to be permitted, it would be useless to have them posted. So far as that is concerned, information as to the *ostensible* rates is now sufficiently accessible to the public, and posting them would only impose a needless annoyance and useless expense upon the corporations.

S.Rep.No. 46, 49th Cong., 1st Sess. 200 (1886)(emphasis in the original).

E. The Plain Meaning Of The Act Is Inconsistent With An Implied Statutory Right To Withhold Payment Of The Filed Rate Pending ICC Determination Of The "Reasonable" Rate

1. The Plain Meaning Of The Act Conflicts With An Implied Right To Withhold Payment

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989), *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 546, 571 (1982).

The Interstate Commerce Act does not contain any provision that expressly states that rate unreasonableness is a defense to enforcement of the filed rate, or that a private shipper has a right to withhold payment of the filed rate pending agency referral. Consistent with the "utterly central" policy of requiring payment of the filed rate (*Maislin*, 111 L.Ed.2d at 112), the statutory language provides only that the shipper may recover "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. § 11705(b)(3). If Congress meant this provision to create a new statutory defense to the duty to pay the filed rate, Congress certainly forgot to say so.

Instead, it appears that Congress sensibly balanced the "utterly central" policy of strict enforcement of the filed rate against the shipper's interest in paying only reasonable rates. Instead of creating a defense to the

"utterly central" filed rate doctrine, Congress did what it said and said what it meant: it gave the shipper a limited right to assert a claim for damages if the filed rate proved to be excessive. But that claim did *not* constitute a defense to the carrier's statutory filed rate claim. Congress created only a limited, express exception to this rule for the United States as a shipper. *See* 31 U.S.C. § 3726.

The Court should not override the plain meaning of the Act when: (1) that plain meaning furthers the "utterly central" policy of the Act of strict enforcement of the filed rate (*Maislin*, 111 L.Ed. at 112), and (2) that plain meaning is not "demonstrably at odds" with the legislative history of the Act (*United States v. Ron Pair Enterprises, supra*, 489 U.S. at 242). Petitioners and their amici fail to identify any legislative history that "demonstrably" shows the unequivocal intent of Congress to create a new statutory defense to filed rate claims.

Elsewhere, the ICC has admitted that Congress in fact declined to give the ICC the broad reparations powers for which it lobbied. *See Informal Procedure For Determining Motor Carrier And Freight Forwarder Reparation*, Ex Parte No. 249 (Sub-No. 1), 335 I.C.C. 403, 408 (1969)("Shippers were thus not given the option, as recommended by the Commission, of proceeding initially before either the Commission or the Court in seeking . . . redress"). If rate reasonableness was "utterly central" to the Act, Congress presumably would have given shippers the express right to withhold payment while they went to the ICC for protection. Further, if Congress had intended to overrule *Crancer v. Lowden*, 315 U.S. 631 (1942), then the legislative history and statutory

language presumably would contain express statements to that effect.

2. The Plain Meaning Also Conflicts With A Right Of Set-Off

The plain meaning of the statute also conflicts with an interpretation that would permit the shipper to exercise a right of set-off. A shipper cannot have a right of set-off if its right to assert the unreasonableness of a filed rate arises only after making payment. If Congress meant to create an unreasonableness defense or a right of set-off, it should have said so. Congress did not say so, except for the United States in 31 U.S.C. § 3726. This Court should not rewrite the Act so as to undermine its "utterly central" policy of strict enforcement of the filed rate. *See Maislin*, 111 L.Ed.2d at 112. Rewriting the statute in this fashion would be the equivalent of demoting the importance of the filed rate.[4] The carrier must collect and the shipper must pay the filed rate.

The ICC has elsewhere admitted that permitting a right of set-off undermines the Act. *See Regulations for Payment of Rates and Charges – Penalty Charges – for Nonpayment (49 CFR Part 1320)*, ICC Ex Parte No. MC-1 (February 17, 1988). There, the ICC explained why it would *not* promulgate a rule to permit shippers to exercise a right of set-off:

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[4] The bankruptcy filing of a carrier does not create a right of set-off. Bankruptcy law preserves a right of set-off that arises prior to bankruptcy, but does not create a right of set-off that did not exist independently of the bankruptcy. *See* 11 U.S.C. § 553(a); 4 *Collier on Bankruptcy* ¶553.06, at 553-38 (15th ed. 1992) ("Prepetition set-offs are governed by applicable non-bankruptcy law").

Other matters. Several shipper groups propose that, if we promulgate final rules, we incorporate a mechanism into the tariff-rule methods that would allow shippers to toll the time at which they become liable for collection charges. They aver that if they have a legitimate dispute over an assessed transportation rate they should be allowed to file with the carrier (within a short time period after completion of the transportation) a letter disputing the rate. The shippers suggest that, as long as a shipper legitimately disputes the rate and is not lodging a *pro forma* protest, then such a letter of protest should exculpate it from collection charges. *We decline to adopt such a provision*. We believe it is impractical. The distinction between a legitimate, honest protest and an illegitimate *pro forma* protest is not an easy distinction and would likely generate a flood of unnecessary litigation. *It is also too easily susceptible to unequal application and thus could promote unlawful discrimination. Finally, as noted supra, shippers are obligated to pay first. Set-offs of freight charges are not lawful. Id.* at 6 (emphasis added and footnote omitted).

The ICC made these observations without even considering the possible use of Fed.R.Civ.P. 67. Rule 67 makes the quoted reasoning of the ICC even more strongly militate against judicial creation of a right of set-off.

3. The Plain Meaning Conflicts With The Proposed Equitable Right Of Recoupment

Petitioners' amici suggest that their right to reparations justifies judicial creation of an implied right of

"recoupment." *See* brief of amicus NITL at 28. This argument does no more than give another label to the incorrect conclusion that the Act permits a shipper to withhold payment of the filed rate.

The proposed implied right of "recoupment" must be rejected for an additional reason. Petitioners' amici admit that: "Recoupment is an *equitable* doctrine. . . . " *See* brief of amicus NITL at 28 n.3 (emphasis added). But *Maislin* precludes judicial creation of equitable defenses to enforcement of the filed rate. The Court stated in *Maislin*:

> Given the close interplay between the duties imposed by [49 U.S.C.] §§ 10761-10762 and the statutory prohibition on discrimination, *see* § 10741, this Court has read the statute to create strict filed rate requirements *and to forbid equitable defenses to collection of the filed tariff*. 111 L.Ed.2d at 108 (emphasis added).

F. Agency Referral Based On Unsubstantiated Claims Of Filed Rate Unreasonableness Will Undermine The Filed Rate Doctrine And Condone Illegality

"[I]n order to merit reference of a matter to the ICC, a shipper must provide more than a bald, conclusory allegation of rate unreasonableness." *In re Oneida Motor Freight v. Ormond Shops*, 126 B.R. 431, 442 (D.N.J. 1991)(collecting authorities). "[T]he district court need not refer the issue of reasonableness to the ICC if there is no reasonable likelihood that the ICC will reach a determination favorable to the shipper." *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, ___F.2d ___ (9th Cir., July 7, 1992). Similarly, when a tariff is unambiguous, this Court has

refused to refer it to the ICC for interpretation. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922).

In light of these principles, a shipper should have no right to agency referral of a reparations claim absent evidence from which the ICC could reasonably decide in the shipper's favor. This Court should halt now the latest effort to nullify the filed rate doctrine and to revive the ICC's illegal *Negotiated Rates* policy. This new defense tactic, condoned by the ICC, relies on this syllogism:

> – Illegal unfiled rates are legitimate evidence of "reasonable" rates.
>
> – When a carrier's filed rate is higher than an unfiled rate, then the carrier's filed rate is unreasonably high.
>
> – Therefore, the shipper is entitled to pay only the unfiled rate, *Maislin* is overruled, and *Negotiated Rates* is reinstated.

This syllogism has the same defect as the ICC's illegal *Negotiated Rates* policy that this Court rejected in *Maislin*. In *Maislin*, the ICC attempted to enforce unfiled rates by declaring that it was an "unreasonable practice" for a carrier to attempt to collect its filed rate after agreeing to an unfiled rate. The ICC called this policy its *"Negotiated Rates"* policy. In rejecting this policy, *Maislin* held that the filed rate doctrine prohibits the ICC from adopting a policy *"sanctioning adherence to unfiled rates"* because such a policy "undermines the basic structure" of the Interstate Commerce Act. *Maislin*, 111 L.Ed.2d at 112 (emphasis added).

Unfiled rates therefore cannot legally serve as evidence to support agency referral of a reparations claim. Under the filed rate doctrine as defined in *Maislin*, an illegal, unfiled rate cannot be used to show that a filed rate is "unreasonable." Otherwise, a carrier would risk liability for reparations based on evidence of unfiled rates. This would sanction adherence to unfiled rates, and *Maislin* expressly forbids any policy "sanctioning adherence to unfiled rates. . . ." *Maislin*, 111 L.Ed.2d at 112.[5]

Despite *Maislin's* mandate, the ICC recently noted that it historically has considered "a carrier's proffer of a particular rate" to be evidence of rate unreasonableness. *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991); *see also* amicus brief of ICC at 6 n.5. The obvious implication of this post-*Maislin* comment is that the ICC may use unfiled rates to support findings of rate unreasonableness.

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[5] The standard for referral should be that the shipper must submit competent evidence from which the ICC reasonably could find that the filed rate of the carrier is unreasonable, taking into account the "reasonable profit" standard of 49 U.S.C. § 10701(e) and the national transportation policies stated in 49 U.S.C. § 10101. "Competent evidence" would not include illegal, unfiled rates.

The national transportation policies stated in 49 U.S.C. § 10101 include: (a) "to promote safe, adequate, economical, and efficient transportation" (§ 10101(a)(1)(B)), (b) "to encourage sound economic conditions in transportation, including sound economic conditions among carriers" (§ 10101(a)(1)(C)), (c) "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices" (§ 10101(a)(1)(D)), and (d) "to encourage fair wages and working conditions in the transportation industry" (§ 10101(a)(1)(F)).

G. The Rule Urged By Petitioners Would Be Highly Prejudicial To Both Solvent And Insolvent Carriers

Petitioners' amici contend that no prejudice will result to a bankrupt carrier if its filed rate claim is postponed pending the outcome of the referral of the shipper's rate unreasonableness claim. *See* brief of amicus ICC at 22; brief of amicus NITL at 24. On the contrary, the rule urged by the ICC will prejudice both insolvent and solvent carriers and will needlessly undermine the filed rate doctrine.

A rule that permits a shipper to delay payment of the filed rate based on a claim of rate unreasonableness will inevitably invite shippers to assert such claims, regardless of their merit. Prejudice will result to all carriers:

A. All carriers will frequently be forced to deviate from all filed rates, regardless of whether they are reasonable rates. In order to obtain prompt payment and to avoid the cost of litigation, carriers will frequently accept less than the filed rate in "settlement" of spurious rate reasonableness defenses. Unless such "settlements" are publicized and filed with the ICC (an unlikely scenario), they will in substance constitute secret, unfiled, ratemaking agreements.

B. Carriers that do not settle spurious reasonableness claims will frequently suffer increased delays in payment while the carriers endure interminable administrative proceedings on spurious rate reasonableness defenses. A marginally solvent carrier will go bankrupt from delays in payment based on spurious rate reasonableness claims. A bankrupt carrier will be unable to

make prompt distributions to creditors on their claims during the pendency of protracted litigation.[6] Unsecured creditors of a bankruptcy estate are acutely prejudiced by delays in distribution, because unsecured claims do not accrue interest during bankruptcy. *See* 11 U.S.C. § 502(b)(2).

The attempted distinction between solvent and insolvent carriers also fails because it is based on a false premise: that an insolvent carrier is not operating. Urging adoption of this false premise, amicus NITL cites an ICC study and states:

> Insolvent carriers – *precisely because they are no longer operating* – do not require a constant and predictable cash flow to preserve their solvency.

See brief of amicus NITL at 24. To credit this assertion, this Court would have to forget the existence of chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174. Many insolvent carriers *do* operate under chapter 11, and they

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[6] A favorite tactic of the ICC and shippers' lobbying groups is to emphasize that a portion of the recoveries of filed rate claims may go to pay the court-approved contingent fee of counsel employed by the carrier's bankruptcy estate. But a bankruptcy estate cannot afford to pay counsel on an hourly basis when the estate is deprived of cash by shippers who wrongfully withhold payment of the filed rate. Further, if the law gives the shipper an incentive to assert a spurious defense to a filed rate claim, then the law also causes an increase: (a) in the employment of defense counsel by shippers to assert such defenses, and (b) the size of the contingent fee demanded by counsel for the estate. These legal costs *by both sides* of filed rate litigation necessarily diminish the recoveries by the carrier, its employees, and other creditors. Strict enforcement of the filed rate doctrine would stop this.

do provide services to the public and jobs and income to their employees. But these same insolvent carriers will fail and liquidate if this Court permits their customers to delay performing their legal duty to pay the filed rate.

Thus, the results of the unfounded rule urged by Petitioners will be highly prejudicial. Further, these prejudicial results are unnecessary. Instead of adopting Petitioners' unfounded rule, the Court should require the shipper to perform its legal duty to pay the filed rate – either to the carrier, or to the court's registry under Fed.R.Civ.P. 67. This rule will deter a shipper from asserting a spurious defense, because the assertion of the defense will not delay payment of the filed rate. This rule also will deter spurious litigation that occurs only if shippers have an incentive to assert rate reasonableness as a defense. This rule will further the "utterly central" filed rate doctrine (*Maislin*, 111 L.Ed.2d at 112), because shippers, carriers and the public will know that shippers are presumptively paying the filed rate. By reason of Fed.R.Civ.P. 67, this rule will not in any way impinge on a shipper's reparations claim. Finally, this rule will prevent unjustified carrier bankruptcies that will result if this Court gives shippers an incentive to stall payment of the filed rate.

II. THE COURT SHOULD NOT REWRITE THE ACT SO AS TO REFER FILED RATE CLAIMS TO AN AGENCY THAT HAS PUBLICLY ANNOUNCED THAT IT: (A) WANTS TO ABOLISH THE FILED RATE DOCTRINE AND (B) WILL NOT SAFEGUARD THE ALLOWANCE OF REASONABLE RATES TO COMMON CARRIERS

Amicus NITL purports to describe at pages 2-6 of its brief the "Regulatory Environment" and the "Nature of the Problem" in this case. But, as described below, the Court may take judicial notice that the "regulatory environment" in reality consists of official opposition by the ICC to enforcement of the filed rate doctrine by carriers. Not surprisingly, this "environment" results in the "problems" of illegal, unfiled rates and of shippers' trying to get filed rate claims improperly referred to ICC so that it can prevent their enforcement.

Congress enacted the filed rate doctrine in 1887 to promote uniform, published transportation rates that would create a more level playing field for competition among businesses using the channels of transportation and that would prevent discrimination against members of the shipping public. *See* S.Rep.No. 46, 49th Cong., 1st Sess. 188, 198 (1886).[7] In addition, the Interstate Commerce Act as amended now expressly states that one of

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[7] In recommending enactment of the Act, the Senate Select Committee on Interstate Commerce reported:

> [T]he committee believes that every effort possible should be put forth by Congress to secure equality between man and man in respect to the matter of transportation, and that one means to that end would be the prohibition of personal preferences under

the nation's transportation policies is to prevent "destructive competitive practices" by carriers. 49 U.S.C. § 10101(a)(1)(D). This policy furthers another express statutory policy: "fair wages" for employees of carriers. 49 U.S.C. § 10101(a)(1)(F).

Through its Chairman, the ICC has publicly attacked these statutory goals. On March 10, 1992, the Chairman of the ICC assailed these goals in a written speech (*"ICC Chairman's Speech"*) entitled "The Revolution in Motor Carrier Transportation" which was presented to the Raritan Traffic Club, Inc.[8]:

A. **Abolish the filed rate doctrine**: Instead of supporting the filed rate doctrine, the ICC Chairman described the tariff freight undercharge issue as a "furball" that "the ICC has in its throat" because bankruptcy trustees are attempting "to collect monies on filed tariff rates despite the existence of lower negotiated rates that were agreed to by a carrier and a shipper. . . . " *ICC Chairman's Speech* at 3. The Chairman described this Court's decision in *Maislin* as a source of "headaches" (*id.*) and condemned the filed rate doctrine as "a *dinosaur* that should be sent to its reward." *Id.* at 4 (emphasis in original); *see* Appendix A.

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suitable penalties, which should be supplemented by proper provisions for securing publicity of rates.

S.Rep.No. 46, 49th Cong., 1st Sess. 190 (1886).

[8] The Court may take judicial notice of this written and widely publicized speech under Rule 201 of the Federal Rules of Evidence. We do not request the Court to take judicial notice of the truth of the speech, only that the words were spoken by the Chairman of the ICC.

B. **Permit below-cost pricing**: Instead of supporting reasonable rates for carriers, the ICC Chairman supported below-cost rates. The Chairman stated: "Then there are charges of destructive below-cost pricing in the LTL [less-than-truckload] sector. In my view, to the extent that it exists, below-cost pricing in the present competitive environment is essentially a derogatory name for very aggressive – and often very efficient – marketing and yield management." *ICC Chairman's Speech* at 2; *see* Appendix A.

Not surprisingly, both Carolina Motor Express and amicus Transcon Lines went bankrupt in a "regulatory environment" polluted by this attitude and the illegal *Negotiated Rates* policy. Many more carriers will fail if this Court permits improper referral of filed rate and unsubstantiated rate reasonableness claims to an agency which: (1) condemns the filed rate doctrine, and (2) endorses below-cost pricing. The federal judicial system will then have to administer those future carrier bankruptcies while former employees and other creditors endure needless delay and economic hardship.

CONCLUSION

A private shipper should not be permitted to withhold payment of an unambiguous filed rate pending the outcome of ICC hearings on rate reasonableness. The shipper must forthwith pay the filed rate, either to the carrier, or into the registry of the court under Fed.R.Civ.P. 67. The shipper has no right to agency referral of a reparations claim unless the shipper submits evidence to

the court from which the agency could reasonably rule in favor of the shipper. Such evidence does not include evidence of unfiled or otherwise illegal rates.

Respectfully submitted,

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September 1, 1992

APPENDIX A: EXCERPTS OF WRITTEN REMARKS BY HONORABLE EDWARD J. PHILBIN, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, TO THE RARITAN TRAFFIC CLUB, INC. ON TUESDAY, MARCH 10, 1992, AT PINES MANOR RESTAURANT, EDISON, NEW JERSEY

"THE REVOLUTION IN MOTOR CARRIER TRANSPORTATION"

President Bush has repeatedly said that government regulations must be necessary, economically sensible, understandable, responsive to public concern and cost beneficial. I couldn't agree more, and I've done my best since becoming Chairman to have repealed or amended useless and outdated regulations that hamper the business operations of the trucking industry and drain the vitality of our nation's economy. While the Commission has made great progress in this effort, there's a lot left to do.

* * *

If, as suggested recently by Federal Reserve Board Chairman Alan Greenspan (and others), the economy is showing signs of rebound, the industry could well see a financial Renaissance through higher freight rates and improved business.

Despite all the evidence to the contrary, allegations of the failure of deregulation continue: a favorite complaint is that there is now, or soon will be, undue if not dangerous carrier concentration in the LTL sector. (The big guys are swallowing the little guys.) I believe that any

apparent concentration in the LTL sector is the result of the unleashing of pent-up market pressures and *not* the result of a failure of the marketplace. In fact, ICC studies indicate that undue concentration has not occurred.

• • •

Then there are charges of destructive below-cost pricing in the LTL sector. In my view, to the extent that it exists, below-cost pricing in the present competitive environment is essentially a derogatory name for very aggressive – and often very efficient – marketing and yield management.

• • •

The major "furball"[9] the ICC has in its throat is the "undercharge issue" caused by attempts of trustees of bankrupt motor carriers to collect monies based on filed tariff rates despite the existence of lower negotiated rates that were agreed to by a carrier and a shipper, billed by the carrier and paid by the shipper, but never filed in a tariff at the ICC by the carrier. The Commission currently has pending more than *200 such cases*.

• • •

The Commission has addressed this issue to the best of its ability under current law. Last September, we discussed applicable rate reasonableness standards and some techniques available to shippers to show that the higher tariff rates sought may not be lawfully collected. The ICC has also issued decisions in individual cases that

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[9] All emphases and quotation marks are in the text of the Chairman's written speech.

provide relief to specific shippers and also offer guidance to others facing similar claims.

The use of contracts seemed a safe remedy for some of the headaches brought about by the *Maislin* decision. But that course of action has its own perils and ambiguities, which we hope to eliminate soon by clarifying the differing requirements of the law and the ICC regulations. The 37,000 carriers who have contract authority deserve to drive on a highway free of legislative and regulatory potholes.

The *real* solution to the undercharge problem lies in remedial legislation. The Commission has supported two bills introduced by Senator Exon and co-sponsors, neither of which has been enacted. For the future, we can only hope for the best.

The undercharge issue, among other things, casts serious doubt on the continued utility of mandatory filing of motor carrier rate tariffs, given the swift pace at which trucking business is done in today's partially deregulated and fiercely competitive transportation marketplace.

• • •

In short, I've seen no evidence that the current statutory filing requirement serves any beneficial interest. Its only function appears to be the perpetuation of an outdated system through sheer aversion to change. The present "filed rate doctrine" is a *dinosaur* that should be sent to its reward.

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